

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 104

Docket No. SF-831M-09-0892-I-1

**Albert J. Alexander, Jr.,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

June 9, 2010

Albert J. Alexander, Jr., Kapolei, Hawaii, pro se.

Cynthia Reinhold, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The Office of Personnel Management (OPM) has petitioned for review of the initial decision, issued October 23, 2009, that affirmed its determination that the appellant had received an annuity overpayment but adjusted OPM's repayment schedule. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#), and we, therefore, DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order.

BACKGROUND

¶2 The appellant separated from federal employment in 1984 because he was disabled from a job-related injury, and on May 7, 1997, he began receiving a disability retirement annuity under the Civil Service Retirement System (CSRS). Initial Appeal File (IAF), Tab 3, Subtab 2a. At the time his annuity started, the appellant was also receiving a scheduled award from the Office of Workers' Compensation Programs (OWCP) for his job-related injury. *Id.* His scheduled award ended on July 3, 2004, and thereafter he received compensation benefits from OWCP. *Id.*, Subtab 2d at 1.

¶3 On December 5, 2006, OWCP notified the appellant that it had become aware that he had been improperly receiving both CSRS annuity benefits and OWCP wage loss benefits for the same period of time, and directed the appellant to elect which benefit he wanted to receive. *Id.* at 3. On December 15, 2006, the appellant elected to receive Federal Employees' Compensation Act benefits from OWCP, retroactive to July 4, 2004, rather than receive benefits under the CSRS. *Id.* at 2. OWCP approved this election and notified OPM of the appellant's decision. *Id.* at 1.

¶4 OPM later informed the appellant that he had received an annuity overpayment totaling \$14,868.20, caused by his receipt of dual benefits from July 4, 2004, through December 30, 2006. OPM further stated that it intended to collect the overpayment by offsetting the appellant's OWCP benefits. *Id.*, Subtab 2c. The appellant requested reconsideration and submitted a Financial Resources Questionnaire supporting his request that OPM waive repayment of the debt. *Id.*, Subtab 2b. OPM, however, denied the request and affirmed its initial decision, finding that the appellant did not meet the criteria for waiver under [5 U.S.C. § 8346\(b\)](#) because he was not totally without fault in causing the overpayment. *Id.*, Subtab 2a. OPM's reconsideration decision also set forth a repayment schedule of \$150.00 per month. *Id.* at 3.

¶5 Following the submission of evidence and argument in lieu of a hearing, the administrative judge affirmed OPM's reconsideration decision, but adjusted the repayment schedule, finding as follows: (1) OPM established the existence and amount of an overpayment; (2) although the appellant was without fault in creating the overpayment, he was not entitled to waiver of the overpayment under OPM's Policy Guidelines on the Disposition of Overpayments; and (3) the appellant was entitled to an adjustment of the agency's recovery schedule from \$150 to \$5.00 per month, because he established that he needed all of his current income to meet current ordinary and necessary living expenses and that recovery of the overpayment would cause financial hardship. IAF, Tab 6.

¶6 In its petition for review, OPM does not challenge the administrative judge's finding that the appellant proved financial hardship warranting an adjustment of the repayment schedule. Petition for Review File (PFR File), Tab 1. Instead, it argues that, under the Board's decisions in *Fearon v. Office of Personnel Management*, [107 M.S.P.R. 122](#), ¶¶ 14-15 (2007), and *Zelenka v. Office of Personnel Management*, [107 M.S.P.R. 522](#), ¶ 13 (2007), the Board lacks authority to adjust the repayment schedule. *Id.*

ANALYSIS

¶7 We find, however, that *Fearon* and *Zelenka* are both distinguishable from the present case, and that neither of these decisions precludes adjusting the appellant's repayment schedule here. In *Fearon*, the appellant, who had been receiving a disability retirement annuity, was restored to earning capacity. [107 M.S.P.R. 123](#), ¶¶ 2-3. OPM determined that the appellant's continued receipt of her disability annuity after being restored to earning capacity caused an overpayment that required repayment. *Id.*, ¶¶ 3-4. OPM told the appellant that she could pay the entire \$10,366.00 overpayment by check or pay monthly installments of \$250.00, and that if she did not elect one of these repayment options, OPM would refer the matter to the Justice Department for litigation or to

the Treasury Department for collection action. *Id.*, ¶ 4. On appeal, the Board found that further adjudication was warranted on the issue of whether the appellant was entitled to a waiver of recovery because she was without fault in causing the overpayment and her financial records supporting her financial hardship claim were outdated. *Id.*, ¶¶ 7-13.

¶8 The Board also found that, while OPM’s regulations generally provide that an appellant who is ineligible for waiver may still be entitled to an adjustment of the repayment schedule if OPM’s repayment schedule would cause financial hardship, the Board lacked authority to adjust the repayment schedule under the circumstances presented. *Id.*, ¶¶ 14-15. Specifically, the Board first found that there was no repayment schedule to adjust because there was, in fact, no repayment schedule in effect. *Id.*, ¶ 15. In this regard, the Board noted that the appellant no longer received an annuity from which OPM could deduct installment payments, and that the appellant had not entered into OPM’s offered voluntary repayment schedule. *Id.*

¶9 The Board then found that, under [5 U.S.C. § 8347](#)(d)(1), its authority is limited to OPM actions or orders that affect the appellant’s “rights or interests” under the CSRS. *Id.*, ¶ 15. The Board further found that OPM’s determination, that the appellant received an annuity overpayment, affected her “interests” under the CSRS, and that the appellant had the “right” under the CSRS to waive recovery of the overpayment if she was without fault and recovery would be against equity and good conscience. *Id.* The Board then found that, if the appellant were receiving a CSRS annuity, a reduction in that annuity to recover an overpayment would also affect her “rights and interests” under the CSRS, and this matter would be within the Board’s jurisdiction. *Id.* It then concluded that, because the appellant was no longer receiving an annuity, OPM’s attempts to recover the overpayment by other means, either by persuading her to enter into a voluntary repayment agreement or by referring the matter to Treasury or Justice, did not affect her “rights or interests” under the CSRS. It, therefore, concluded

that it lacked authority to adjudicate the appellant's possible entitlement to an adjustment of the recovery schedule. *Id.*

¶10 *Zelenka* also concerned an appellant who received an annuity overpayment caused by her return to earning capacity while receiving a disability retirement annuity. [107 M.S.P.R. 522](#), ¶ 2. The Board followed *Fearon*, and found that, because the appellant was no longer receiving an annuity from which OPM could deduct installment payments, OPM's attempts to recover the overpayment do not affect the appellant's "rights or interests" under the CSRS, and that the Board, therefore, lacks authority to adjudicate the appellant's possible entitlement to an adjustment of the repayment schedule. *Id.*, ¶ 13.

¶11 Those cases differ from the present case because those appellants were restored to earning capacity and were not receiving any recurring payment from any source from which their debts could be offset. Here, however, the appellant continues to receive a continuing payment from which his overpayment may be administratively offset, his OWCP benefits, and OPM has set a repayment schedule requiring that a specific amount be offset from those recurring benefits for a specific period of time. IAF, Tab 3, Subtab 2a at 3.

¶12 Viewing the appellant's continued receipt of OWCP benefits as a basis for adjusting the appellant's repayment schedule is consistent with OPM's regulations. The regulations define "offset" as either "to withhold the amount of a debt, or a portion of that amount, from one or more payments due the debtor," or "the amount withheld in this manner." [5 C.F.R. § 831.1303](#). The regulations define "repayment schedule" as "the amount of each payment and number of payments to be made to liquidate the debt as determined by OPM." *Id.* Thus, under these definitions, OPM may determine an offset repayment schedule where the appellant receives some form of payment from which OPM could deduct a set amount for a specific number of payments. Neither *Fearon* nor *Zelenka* concerned a payment to those appellants from which their debts could be offset, and there was, therefore, no repayment schedule for the Board to adjust. The

circumstances in those cases are, therefore, distinguishable from the present case, and do not preclude adjusting the appellant's repayment schedule here. To the extent those cases suggest that the Board lacks authority to adjust an OPM-set repayment schedule in the absence of an OPM annuity, they are hereby modified.

¶13 We also find no reason to disturb the administrative judge's decision to adjust the repayment schedule. OPM has not challenged the administrative judge's finding that the appellant was without fault in causing the overpayment. IAF, Tab 6 at 4-5; PFR File, Tab 1. The appellant has not challenged the administrative judge's finding that he did not show entitlement to a waiver of the overpayment. IAF, Tab 6 at 5-6. Where an appellant is ineligible for waiver, he may still be entitled to an adjustment in the repayment schedule where he shows that it would cause him financial hardship to make the payment at the scheduled rate. [5 C.F.R. § 831.1401](#). OPM has not challenged the administrative judge's finding that the appellant showed such financial hardship, and that the repayment schedule should be adjusted to \$5.00 per month. IAF, Tab 6 at 6-9. We agree with that analysis.

ORDER

¶14 We, therefore, ORDER OPM to reduce the appellant's repayment schedule to a rate of \$5.00 per month. OPM must complete this action no later than 20 days after the date of this decision.

¶15 We also ORDER OPM to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. We ORDER the appellant to provide all necessary information OPM requests to help it carry out the Board's Order. The appellant, if not notified, should ask OPM about its progress. See [5 C.F.R. § 1201.181\(b\)](#).

¶16 No later than 30 days after OPM tells the appellant it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the

office that issued the initial decision on this appeal if the appellant believes that OPM did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes OPM has not fully carried out the Board's Order, and should include the dates and results of any communications with OPM. See [5 C.F.R. § 1201.182\(a\)](#).

¶17 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. § § 1201.201](#), 1201.202 and 1201.203. If you believe you meet these criteria, you must file a motion for attorney fees **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your

representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and Forms [5](#), [6](#), and [11](#).

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.